



**IN THE EAST AFRICAN COURT OF JUSTICE
FIRST INSTANCE DIVISION**



Coram: *(Yohane Masara, PJ; Charles O. Nyawello; Charles Nyachae; Richard Muhumuza; Richard Wabwire Wejuli, JJ)*

APPLICATION NO.9 OF 2019
(Arising from Reference No.16 of 2019)

BOB RUGURIKA AND 17 OTHERS APPLICANTS

VERSUS

**THE ATTORNEY GENERAL THE
REPUBLIC OF BURUNDIRESPONDENT**

8TH OCTOBER, 2021

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RULING OF THE COURT

A. INTRODUCTION

1. The instant Application arises from **Reference No.16 of 2019** filed by the Applicants, the essence of which is that the Applicants' properties were unlawfully seized on the orders of the Respondent's agents, in contravention of the laws of Burundi and of the Treaty for the Establishment of the East African Community.
2. The Application was brought under **Articles 6(d), 7(2), 27(1), 30 and 39 of the Treaty for the Establishment of the East African Community ("the Treaty") and Rules 1(2), 21, 22, 23, 84 and 85 of the East African Court of Justice Rules of Procedure 2013.**
3. The Applicants seek the following orders, pending disposal of Reference 16 of 2019, to:
 - i. **Certify the Application as urgent;**
 - ii. **Restrain and prohibit further execution of the orders of the President of the Supreme Court of the Republic of Burundi jointly with the Prosecutor General issued on 15th May 2019 to seize the movable and immovable properties of 32 individuals associated with case No. RMPG 697 bis/MA/BV/NTH;**
 - iii. **To provide this Honourable Court with assurance that the Respondent will with immediate effect cease the said illegal appropriation of land and allow those evicted to return to their homes pending determination of Reference no 16 of 2019 before this Court;**

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- iv. **Restrain and prohibit the Respondents from making any structural changes to the properties in question;**
- v. **Restrain and prohibit the Respondents from disposing of the said properties either through sale or physical destruction; and**
- vi. **That the Respondent meets the costs of this Application.**

B. APPLICANTS' CASE

4. The Applicants' case is stated in the Affidavit in Support of the Application deposed by Cyriaque Nibitegeka, in that while criminal case **RMPG 697bis/MA/BV/NTH** brought against the Applicants was still pending determination in Court, the Respondent through her agents, namely; the Prosecutor General and the President of the Supreme Court of Burundi, who prematurely and illegally issued a joint Notice /Letter of seizure of the Applicant's properties, seized the said properties. That these decisions and actions contravene **Articles 6(d), 7(2), 8(1)(a), 8(5) of the East African Treaty and Article 15(1) of the East African Common Markets Protocol.** That if the Respondent is not ordered to halt and reverse seizure of the properties as a result of the impugned orders, the Applicants will be adversely affected and the main Reference will be rendered nugatory. Further, that the Applicant will suffer irreparable harm and they will be greatly prejudiced as a result of the seizure of the properties without following the process of the law. Lastly, that the irreplaceable destruction of both immovable and movable property they will suffer, should the Respondents dispose of or make alterations to their property through sale or demolition, is irreparable.

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FACT

C. RESPONDENT'S CASE

1. The Respondents contention is that the Respondent acted in accordance with the law and in the interests of the state and of the citizens of Burundi and persons resident in Burundi who were victims of the Applicants' actions in case **RMPG697/MA/BV/NTH** and that there was therefore no triable issue nor injury that would be suffered by the Applicants because the seizure was founded on lawful grounds.
2. In reply on behalf of the Respondents, Pascal Nkuriyingoma a Senior Public Prosecutor, deponed that the Applicants were involved in insurrectional activities, entailing massacres and attempted *coup de 'etat* against the government of Burundi and that as result, criminal proceedings were instituted against them in **RMPG697bis/MA/BV/NTH** and that the Applicants fled the Country to escape justice and consequently international arrest warrants had been taken out for the Applicants.
3. That the Prosecutor General seized all movable and immovable property of the persons against whom criminal proceedings were instituted in **RMPG697 bis/MA/BV/NTH** for their participation in insurrection which had culminated into deaths and loss of property pending the outcome of the proceedings instituted against the Applicants. He further deponed that following judgment delivered against the Applicants, the President of the Supreme Court of Burundi and the Prosecutor General made an execution order of seizure of properties belonging to the Applicants in order to compensate the victims of crime perpetuated by the Applicants and to also save the property from deteriorating.
4. Owing to constraints on this Court's activities caused by the COVID19 pandemic related restrictions, the Application to certify the instant

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Application No.9 of 2019 as urgent was overtaken by effluxion of time and was therefore not entertained by this Court. Application No. 9 of 2019 was therefore heard inter parties and was not certified as urgent.

D. SUBMISSIONS FOR THE APPLICANT

5. Counsel for the Applicant set out to determine three issues, namely:

- (a) whether the Reference raises triable issues;**
- (b) Whether the Applicant suffered irreparable injury; and**
- (c) Where the balance of convenience lies.**

6. He submitted that the Application satisfies the criteria for grant of interim orders. That it raises triable issues as stated in Paragraphs 29 to 32 of the Reference.

7. In those paragraphs, the Applicant has made allegations of violation of Burundian law, - specifically **Articles 36, 38 and 40 of the Constitution of the Republic of Burundi** and of **Articles 6(d), 7(2), 8(1)(a), 8(5) of the Treaty and Section 15(1) of the East African Common Markets Protocol.**

8. Regarding the question as to whether the Applicants will suffer irreparable loss, Counsel for the Applicants submitted that the loss already suffered and that which will continue to be suffered by the Applicants if the Application is not granted, is irreparable.

9. The learned Counsel cited the case of **Francis Ngaruko V the Attorney General of the Republic of Burundi, EACJ, Application No. 3 of 2019** to support his submission that when considering the *balance of convenience* as a part of the criteria for determination of whether or not to grant an interim measure, it was not mere convenience that needed to be weighed but the risk of doing an injustice to the one side or the other.

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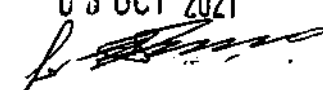


E. SUBMISSIONS FOR THE RESPONDENT

10. For the Respondent, Mr. Diomedede Vyizigiro, learned Counsel, contended that there was no joint decision made by the Prosecutor General and the President of the Supreme Court but that there were two separate decisions in two different Court cases, namely; **LPSA859** and **RMPG697/MA/BV/NTH**.
11. Counsel for the Respondent intimated that seizure of the Applicants' property was done in accordance with and in exercise of Prosecutor General's mandate under **Articles 133 and 134 of Law No.1 /08 of 7th March 2005**. That the seizure was motivated by the need to guarantee compensation of the victims of the unlawful actions of the Applicants with proceeds from disposal of the said properties and also to prevent deterioration of the said property, alleged to have been abandoned by the Applicants and others alleged to have fled from justice.
12. Counsel further informed Court that all the Applicants had been convicted in **LPC100** arising from criminal case **RMPG697/MA/BV/NTH** and sentenced to life imprisonment and are required to compensate the damage caused by them during the insurrection and attempted coup. That the judgement in the said case had been notified to all the accused persons, who included all the Applicants, through the formal channel for notification of persons not having a known place of residence or address. He drew Court's attention to the fact that all the Applicants had made declarations on 11th February 2021, in response to the said criminal case notice in LPC100 arising from criminal case **RMPG697/MA/BV/NTH** that they were in Brussels, Belgium.

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F. REJOINDER FOR THE APPLICANT

13. In rejoinder, Counsel for the Applicants contended that the issue of residence is one which would be determined in the main Reference and that Affidavits in reply should not be relied on as they are fatally irregular for arguing the law instead of stating facts regarding the Prosecutor General's reason for seizure of the property to ostensibly compensate the victims of alleged insurrection.

G. COURT'S DETERMINATION

14. This Court's mandate to grant interim orders is derived from **Article 39 of the Treaty** which provides that:

"The Court may, in a case referred to it, make any interim orders or issue any directions which it considers necessary or desirable...."

15. The test for grant of interlocutory injunctions was long settled in the case of **Geilla V Cassman Brown [1973] EA 358** in which Court held that:

"First, an Applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not be granted unless an Applicant might otherwise suffer irreparable injury, which would not be adequately compensated by an award of damages. Thirdly, if Court is in doubt, it will decide an application on a balance of convenience"

16. At this stage, when considering whether there is a *prima facie* case with a probability of success, the Court is not mandated to inquire into the controversies of the evidence and facts that support the case of either party nor to decide difficult questions of law which call for detailed

argument as these are matters for consideration at the trial. This position was articulated by the Court in the case of **East African Civil Society Organisation Forum (EACSOFF) vs. Attorney General of Burundi and 2 Others, Application No. 5 of 2015**, in which it relied on the maxim in **Prof. Anyang' Nyong'o & 10 Others vs. AG of the Republic of Kenya and 3 Others, Ref No. 1 of 2006** and **American Cyanamid vs. Ethicon Ltd (1975) C 396** all of which underscored the need for a Court considering an Application for temporary relief to be satisfied that the claim was not frivolous or vexatious but rather presented a serious question to be tried, without necessarily delving into the determination of a *prima facie* case.

17. As was stated by this Court in the case of **The Democratic Party & Another vs. The Secretary General EAC and the Attorney General of the Republic of Uganda [2015-2011] EACJLR 370**, the finding that there is a *prima facie* case with a probability of success is to say no more than that if the Respondents do not put up any plausible defence or response, the Applicants would succeed.

18. In Paragraphs 29 to 32 of the Reference, the Applicants accuse the Respondent, through the acts and or omissions of its agents, of contravening the fundamental and operational principles of the Treaty by failure to guarantee the right to due process before seizing the Applicants' property, failure to accord the Applicants a right to a fair trial, failure to guarantee and respect the right to own and enjoy property.

19. This Court has specifically held, in the case of **British American Tobacco (U) Ltd V AG of the Republic of Uganda EACJ Application No.13 of 2017**, that within the context of the EAC Community law, a cause of action demonstrating the prevalence of a serious triable issue exists where the Reference raises a legitimate legal question under the Court's legal regime as spelt out in Article 30(1) of the Treaty; more specifically,

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where it is in contention thereof that the matter complained of violates the Partner State law and the Treaty. The seizure of the Applicants' property and the fact that the Applicants had to flee from the Republic of Burundi for whatever reasons is not in contest. This Court is satisfied that the circumstances raised by the Applicants present serious triable issues in that regard.

20. It is also a settled position of the law, as stated in the case of Giella V Casman Brown (supra), that an interlocutory injunction will not normally be granted unless the Applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages.

21. In the case of American Cyanamid Co. vs. Ethicon Ltd (supra), while determining what amounts to irreparable harm, Court stated as follows:

“... the governing principle is that the Court should first consider whether, if the plaintiff were to succeed at trial in establishing his right to a permanent injunction, he would be adequately compensated by an award of damages for the loss he would have sustained as a result of the defendant's continuing to do that which was sought to be enjoined between the time of the Application and the time of the trial. If damages in the measure recoverable would be [an] adequate remedy and the defendant would be in a financial position to pay them, no interim injunction should normally be granted, however strong the plaintiff's claim appeared to be at that stage.” (Emphasis added).

22. Counsel for the Applicants submitted that the loss already suffered and that which will continue to be suffered by the Applicants, if the Application

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is not granted, was irreparable. The loss envisaged as discerned from paragraphs 16, 17, 18 and 19 of the Affidavit in support of the Notice of Motion is the loss of both movable and immovable properties, including homes.

23. Whereas injury, whether reparable or irreparable, is a question of evidence and must be proved –see Timothy Kahoho V SG- EAC (supra), in the instant case, the loss anticipated was not specifically quantified, even if it was stated to entail homes and immovable property. The Applicants did not also demonstrate or contend that, should the Reference be determined in their favour, the Respondents would not be able to compensate them for the movable and immovable property seized.
24. On the other hand, in addition to the contention that the property was seized in execution of lawful orders, it was also contended for the Respondents that the properties were lawfully seized to preserve them from deterioration and that therefore no irreparable loss would be suffered.
25. That said, whereas the value of movable and immovable property is presently unknown, it is such as can be ascertained and quantified and is therefore deemed to be capable of being atoned for in damages as the Government of Burundi would be capable of payment in the event that the Reference is determined in favour of the Applicants.
26. Further, as already stated, the Applicants did not contend or demonstrate that should the Reference be determined in their favour, the Respondents would be unable to compensate them. This Court is not convinced that the Applicant would suffer loss which the Respondents would not be able to adequately atone for in damages.

27. It is also a settled position of the law and practice that the conditions for granting interlocutory injunctions are sequential, so that the second condition can only be addressed if the first condition is satisfied and when the Court is in doubt, the third one, being consideration of the Application on a *balance of convenience*, is then addressed. (See: Kenya Commercial Finance Co. Ltd V Afraha Education Society [2001] EA 86; Timothy Kahoho V Secretary General EAC [2012-2015] EACJLR 181). It is therefore behoved of this Court, in the instant Application, to consider the *balance of convenience*.
28. In the case of American Cyanamid (supra), it was held that if it was considered that there was any difficulty regarding the availability of damages on either side, the Court should consider the *balance of convenience* between the parties and if these factors were evenly balanced, the Court should consider maintaining the status quo.
29. Premised on the affidavit evidence and the submissions by respective Counsel for the parties, whereas the Applicant has convinced this Court that there is a *prima facie* case made out, they have not convinced the Court that they would suffer irreparable injury if the interim injunction is denied. On the other hand, at this stage, the legitimacy of the impugned orders is not clear and is in contest.
30. On the facts of this case, the status quo regarding the seized properties is that the property is under the physical custody of the Respondents and further that, presently, all the Applicants live out of the Republic of Burundi under circumstances that they would not even be able to return to the Country to take physical custody of the seized property. In the premise, this Court finds that the *balance of convenience* lies with the Respondent.

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31. Additionally, the primary purpose of interim injunctions is to preserve *status quo* until the question to be investigated in the suit can be finally disposed of – (see: **Noormohamed Jan Mohamed vs. Kassamali Virji Madhani (1953) EACA 8**).

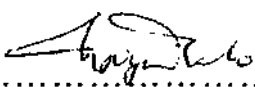
32. The balance of convenience having been found to be in favour of the Respondent and given that the Application if granted would change the status quo, the prayer for an interim injunction is denied in its entirety.

33. The costs shall abide the outcome of the Reference.

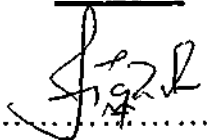
34. It is so ordered.

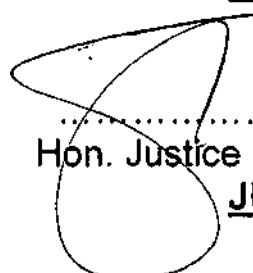
Dated, signed and delivered at Arusha this 6th Day of October, 2021.


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Hon. Justice Yohane B. Masara
PRINCIPAL JUDGE


.....
Hon. Justice Charles O. Nyawello
JUDGE


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Hon. Justice Charles Nyachae
JUDGE


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Hon. Justice Richard Muhumuza
JUDGE


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Hon. Justice Richard W. Wejuli
JUDGE

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